SUPREME COURT, U.S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. ~~1403~~ 172

MERRITT-CHAPMAN & SCOTT CORPORATION, Petitioner

*v.*

UNITED STATES, Respondent

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Leslie A. Hynes, in behalf of Petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Claims entered in the above case on February 17, 1967.

## OPINIONS BELOW

The opinion of the Court of Claims is unreported and is included in the record.

## JURISDICTION

The judgment of the Court of Claims was made on February 17, 1967, and a copy thereof is included in the record. The jurisdiction of this court is invoked under 28 U.S.C. 1255.

## QUESTIONS PRESENTED

In its suit before the Court of Claims, the Petitioner sought review of a decision by the Corps of Engineers Board

of Contract Appeals (No. 2223) denying the plaintiff's claim to an equitable adjustment under the changes clause of the contract for work the government required it to perform on lock gates for a dam project.

The contract contained, as required by the Armed Services Procurement Regulations, a provision authorizing final acceptance of material and finished articles wherever the quantity justified it at the place of production. That provision was Article 9(d) of the contract, which provided that:

> "Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and written or other formal acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract, damage or loss in transit, fraud or such gross mistakes as amount to fraud. Subject to the requirements contained in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site. Nothing contained in this paragraph (d) shall in any way restrict the Government's right under any warranty or guarantee."

The lock gates in question were inspected and accepted at the place of production. Thereafter, at the site the respondent ordered the plaintiff to perform additional work on the lock gates despite their acceptance and refused to issue the plaintiff an equitable adjustment under the changes clause. The plaintiff followed all the administrative procedures to obtain a review of that decision, but its claim was denied by the Corps of Engineers Board of Contract Appeals in No. 2223. The petitioner then sought review in the Court of Claims. The Court of Claims held that as a matter of law that the plaintiff

was not entitled to recover and dismissed its petition. The questions presented are:

1. On what grounds can the mandates of a contract provision required to be in a federal contract by the Armed Services Procurement Regulations be avoided?

2. Has the Court of Claims properly interpreted the acceptance provisions of the instant contract?

## STATUTES — FEDERAL RULES AND REGULATIONS INVOLVED

The pertinent portions of the Armed Services Procurement Regulations requiring source inspection and acceptance are Sections 14.108, 14.105-2, 14.110.1, 14.201(b) and 14.204. They are set forth in the Appendix at page 1a. The contract clause which they required be made a part of government contracts is Article 9(d). It is set forth in the Appendix at page 1a.

## STATEMENT

In October, 1955, the Savin Construction Corporation entered into a contract in the estimated amount of $16,312,765 with the Pittsburgh District of the Army Corps of Engineers for the construction of locks at the New Cumberland Locks and Dam Project on the Ohio River near Stratton, Ohio. The present Petitioner subsequently succeeded to the rights and obligations of the Savin Construction Corporation. One of the major items in the contract called for the furnishing and installing of lock gates which were to consist of two upper and two lower gates, with each gate to have two leaves. In November, 1955, petitioner subcontracted the fabrication of the gates to Higgins, Inc. of New Orleans, Louisiana, for a lump sum price of $453,000. and subcontracted the erection of the gates

to Penn-Southern Construction Company of Pittsburgh, Pennsylvania.

Pursuant to a requisition by the Pittsburgh District of the Corps of Engineers, the New Orleans District provided shop inspection services for the fabrication work at the Higgins plant and assigned R. A. Jackson, a marine equipment inspector.

Mr. Jackson spent approximately two hours a day during the period of fabrication inspecting the gates. The scope of his inspection at the Higgins plant included dimensions, alignment, match marking, assembly and disassembly of the gates. Mr. Jackson satisfied himself during his inspection that in all these respects the gates were satisfactory and in accordance with contract requirements.

There were eight leaves to the gates and seven major pieces to each leaf, making 56 major sections — and all told there were about 30,000 pieces, counting small parts.

Throughout his inspection, whenever Jackson found work he considered unsatisfactory, he required that it be redone. For instance, some of the welding had to be done over, diaphragms or members that were not properly aligned were straightened, and some machine work was corrected. It was Jackson's opinion at the Board hearing, based on his inspection at the Higgins plant and a subsequent view of the gates while stored at the job site, that with the exception of a few minor items of no great importance, the gates were fabricated by Higgins satisfactorily and in accordance with plans and specifications.

The lower gates were shipped to the job site by barge on October 14, 1957, the upper gates on October 18, 1957. Due to Jackson's being on leave on the latter date, another government inspector, Wright G. James, was present for loading of

the upper gates. He considered that the gates were properly loaded and noted no major defects therein. Jackson (James in the case of the upper gates) signed forms DD250-3 entitled "Sub-Order Material Inspection Memorandum", indicating that the gates had been inspected prior to shipment. The Court of Claims found that under the applicable Armed Services Procurement Regulations, the execution of these forms signified that the gates had been inspected and accepted as conforming with contract rquirements. 32 C. F. R. (Rev. 1954, cum. supp. 1960) Part 14 Section 14.201. See also *Gordon H. Ball, Inc.*, ASBCA No. 8316, 1963 BCA 19,467-19,477. In addition, the Court of Claims found that the testimony of the Corps of Engineers representatives before the Board made it clear that they understood the import of the execution of thse forms, i.e., that the gates had been inspected and found acceptable in New Orleans.

The barges arrived at the job site the first part of November. Penn-Southern unloaded the gate sections and parts from the barges and stored them at the job site in an area referred to as the brickyard.

The contract provided that furnishing and installation of the gates were to be paid for under Item 22. This item was broken down for contract administration purposes in such a way that 60 per cent would be paid upon delivery to the job and the other 40 per cent upon installation and acceptance. The Court of Claims found that plaintiff was given credit for 60 per cent which was full credit for delivery to the job on Item 22 on the November 1957 payment estimate.

Thereafter, the contracting officer on April 2, 1958 wrote plaintiff as follows:

> "The lock gate sections stored at the job site have been observed by representatives of this office. While it is our position that final acceptance of the gates will be made

only when erection has been completed, a number of deficiencies which must be corrected before erection starts have been observed. Some of these deficiencies are listed below:. . . ."

Upon receipt of this letter from the contracting officer, plaintiff engaged Penn-Southern to perform the indicated work on a cost-plus basis.

The Government then assigned a shop inspector to the project full time. The Government assigned Conway D. Deyton, an experienced shop inspector, who arrived at the site on April 11, 1958, and remained for seven months, until in the latter part of November of that year, substantially all the ordered work was completed.

The ordered work required some 55,000 man hours, the magnitude of which is illustrated by the fact that the original fabrication work at New Orleans involved only about 66,000 man hours.

To avoid assessment of liquidated damages, petitioner sought a time extension because of the delay caused by the ordered work. The Corps of Engineers Board of Contract Appeals (No. 1709) allowed the claim, holding that the delay was an excusable one under Article 5(c) of the contract which allowed an extension of time "because of any delays in the completion of the work due to causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to . . . acts of the Government, in either its sovereign or contractual capacity . . . "

Subsequent to this Board decision in No. 1709, petitioner sought an equitable adjustment under the Changes article because of the work ordered on the lock gates. The Corps of Engineers Board of Contract Appeals (No. 2223) denied the claim on the ground that the source acceptance was not en-

titled to any finality since there were "departures from specific requirements of the contract", which in accordance with Article 9(d) were specifically excluded from final acceptance. In the Board's words, ". . . a departure results where the components are so poorly worked that they cannot, in the condition they are in, be fit together and erected into gates. This was the situation here. In our view, the exceptive phrase does extend to those matters which are recognized as not being left to an inspector's discretion and judgment".

Although there was evidence in the record that a substantial portion of the ordered work was namely for the sake of appearance, the Board refused to compensate the petitioner for any portion of the ordered work related to the "specific departures" it found.

Plaintiff then brought its action to the Court of Claims, arguing that under the contract, final acceptance of the gates was to be at the place of production; that the Board's interpretation of the exceptive phrase in Article 9(d) "departures from specific requirements of the contract" was incorrect as a matter of law; and that in any event the Board's application of the exception was arbitrary and capricious in that it refused to give any finality to the acceptance in New Orleans, making no attempt to segregate the work which was required to correct the specific departures it found for the rest of the ordered work, and because it refused to give the plaintiff the opportunity before the contracting officer to show which of its ordered work was unrelated to the "departures found by the Board". Petitioner further maintained that, in any case, the Board's factual determination as to the "specific departures" it found was not supported by substantial evidence.

The Court of Claims did not reach the issues presented by the Petitioner. Had it done so, it would have had to overturn the Board's decision. The Court of Claims found that for reasons not considered by the Board, the source acceptance was

not to be entitled to any finality. Pursuant to Article 9(d), acceptance is final "unless otherwise specified in the contract". The Court of Claims found that the contract did provide in other provisions that the source acceptance of the gates was not to be accorded any finality.

## REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it refuses to apply the provisions of an inspection and acceptance clause required to be in the contract by the Armed Services Procurement Regulations, and in so doing, disrupts the orderly administration of government contracts.

The Court of Claims refused to apply the acceptance provisions of Article 9(d) because it found that "it would seem" that the specifications indicated that final acceptance of the gates was not to take place until after their erection, and because "it would seem that considered as a whole, the specifications contemplated a single acceptance upon over-all completion of the work".

However, it is the clear intent of the Armed Services Procurement Regulations that source inspection and acceptance is to be final and binding. Moreover, nowhere in the specifications is there a clear and specific expression that the acceptance of the gates at their place of production under Article 9(d) was not to be accorded the normal degree of finality contemplated by the Armed Services Procurement Regulations and expressed in that Article.

This is so in spite of the fact that the Corps of Engineers realized, while drafting the contract, that fabrication of the gates would have to take place at a location other than the site. Even though specific provisions concerning that off-site fabrication were included in the contract, the one sentence, that off-site acceptance will not be final, which would have

accomplished the result the Court of Claims reached, was not included.

In order to find that the contract provided that an Article 9(d) acceptance was not to be final, the Court of Claims could point only to four provisions of the contract which did not state that source acceptance under Article 9(d) was not to be accorded any finality. Moreover, by interpreting these provisions to preclude off-site acceptance, the Court of Claims sanctioned the Government's use of a dual standard of inspection. The court found the gates were acceptable to the New Orleans District. However, the Pitssburgh District did not agree with the New Orleans District and totally disregarded the source acceptance made under Article 9(d) of the contract.

It is the clear intent of Article 9(d) that if its acceptance was not to be final, that the contract should "otherwise state".

Although the contract in this case did not so state, the Court of Claims still refused to apply Article 9(d). Therefore, the contractor has been required to bear the expenses caused by the dual standard of inspection despite the assurance guaranteed by the contract that off-site acceptance would be final.

The issue presented to the court is one of vast importance in the administration of government contracts as the allowance of dual standards of inspection can only cause contractors to include in their bids higher contingency amounts and this case should be taken upon certiorari to review the issue of the coverage of acceptance provisions in federal contracts just as this court took upon certiorari the issue of the coverage of disputes clauses in federal contracts in the recent case of *U. S. v. Utah Construction & Mining Co.*, 87 *S. Ct.* 1545 (1966). Further, the issue presented to this court should be taken upon certiorari because the decision is in conflict with the intent of the Armed Services Procurement Regulations

and a prior administrative decision regarding this issue and affects all Government contracts using Standard Form 23A.

Because the Department of Defense specifically wanted to authorize source inspection and acceptance, Article 9(d) was included in their Standard Form 23A, which, by virtue of Section 16.401 of the Armed Services Procurement Regulations, was a necessary part of this contract let by the Corps of Engineers.

The Armed Services Procurement Regulations, in Section 14.108, specifically provided that a source inspection and acceptance could take place at the plant of a subcontractor.

> "Supplies and services that do not qualify under the criteria in Section 14.105-2 for Government inspection at source shall not be inspected by the Government at the subcontractor's plant or at a construction site".

The reasons for providing for an Article 9(d) source inspection and acceptance are set forth in Section 14.105-2 of the Armed Services Procurement Regulations. It provides that —

> "Inspection at Source — Supplies and services shall be inspected at source where:
>
> (i) inspection at any other point would require uneconomical disassembly or destructive testing;
>
> (ii) considerable loss would result from the manufacture and shipment of unacceptable supplies or from delay in making necessary corrections;
>
> (iii) special instruments, gauges or facilities required for inspection are available only at source;
>
> (iv) a quality control and inspection are closely related to production methods. . . "

The Government, in this case, did conduct such a source inspection. There is little question that not only were these gates which included 30,000 separate parts the very type of item for which a source inspection was intended, but that, also, each of the reasons set forth in Section 14.105.2 for source inspection and acceptance applied to the fabrication of these gates.

Further, there is no question that the gates were accepted at their source. (Commissioner's Report, p. 10) No other finding was possible based on the language of Article 9(d) and the mandates of Section 14 of the Armed Services Procurement Regulations.

Section 14.110.1 deals with the authorization of the shipment of supplies. It provides that,

> "Generally, the Government inspector shall sign or stamp the shipping papers, accompany service inspected supplies on both prime contracts and sub-contracts to release them for shipment."

The effect of that act of signing these shipping papers is recited in Section 14.201(b).

> "Acceptance shall ordinarily be accomplished by execution of an acceptance certificate on the applicable inspection and receiving report form (for example, DD Form 250, DD Form 1155, or Standard Form 44) or other written notice of acceptance. Where acceptance is accomplished at a point other than destination, supplies shall not be reinspected at destination for acceptance purposes. However, such supplies shall be examined at destination for damage in transit, quantity and possible substitution or fraud."

This part of the regulation reaffirms that the determinations made at the source inspection are binding and

further states that the issuance of DD Forms 250, like the ones issued in this case, constitute a formal written acceptance.

Admittedly, acceptance is usually the responsibility of the Contracting Officer or his authorized representative. However, the regulation does reconcile this fact with the ability of a source inspector to issue an acceptance.

In Section 14.204, it states that while,

> "(A) Acceptance is the responsibility of the Contracting Officer or his authorized representative, where an activity uses services of another activity or department for the purpose of acceptance, acceptance by the other activity or department is binding on the activity for which services are performed."

However, the Court of Claims ruled that although there was a source inspection, that the acceptance at that time was not final. This position is in direct conflict with Section 14.104 of the Armed Services Procurement Regulations entitled "Activities responsible for inspection." It provides that,

> "Inspection, or the assignment therefor, is the responsibility of the contracting activity. Where a department or activity uses the inspection services of another department or activity, the department or activity performing such inspection has primary inspection cognizance and its inspection determinations are binding on the department or activity for which the inspection services are performed."

It is the clear intent of the Armed Services Procurement Regulations that source inspection and acceptance is to be final and binding.

This intention has been enforced in the case of *Appeal of Gordon H. Ball*, ASBCA 8316, 1963 BCA 19467, where the

Government had unsuccessfully argued that an article 9(d) acceptance could not be accorded finality because the specifications provided otherwise.

There is no question of fact involved of whether or not the contract specifically provided otherwise. It did not. The issue is whether the Court of Claims should be allowed to interpret the contract as a whole to find an implied intention to deny finality to an Article 9(d) acceptance.

The issue is can the protection afforded a contractor by Article 9(d) be eroded by inference. Can the guarantees of a provision such as this, which, since it is required to be in the contract by the Armed Services Procurement Regulations, and which therefore has the force of law, be avoided by implication? *G. L. Christian & Associates,* 312 F. 2d 418, 320 F. 2d 345, 375 U.S. 934.

Had the Government meant to withhold that protection afforded by source acceptance, it could have done so in an explicit fashion and thereafter expected to receive bids on that basis. Since it did not do so, the Appellant is entitled to the protection against a dual standard of inspection and the costs attendant thereon. The Appellant has in the court below, and does now further take exception on the ground that the clauses used by the Court of Claims to deny finality to the source acceptance are being misinterpreted. Each of those clauses is subject to other more reasonable interpretations and should be so interpreted in order not to bring them into conflict with the Armed Services Procurement Regulations.

Respectfully submitted,

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